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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Kari Lake; Mark Finchem,

Plaintiffs,

v.

Kathleen Hobbs, as Arizona Secretary of State;
Bill Gates; Clint Hickman; Jack Sellers;
Thomas Galvin; and Steve Gallardo, in their
capacity as members of the Maricopa County
Board of Supervisors; Rex Scott; Matt Heinz;
Sharon Bronson; Steve Christy; Adelita
Grijalva, in their capacity as members of the
Pima County Board of Supervisors,

Defendants.

No. 22-cv-00677-JJT
(Honorable John J. Tuchi)

**PLAINTIFFS' PARTIAL
OPPOSITION TO MARICOPA
DEFENDANTS' MOTION FOR
JUDICIAL NOTICE**

1 Plaintiffs submit this memorandum in partial opposition to the Maricopa
 2 Defendants’ (“Defendants”) Motion for Judicial Notice, ECF no. 29. Except for one
 3 document, and facts irrelevant to the pending motion to dismiss, the judicial notice sought
 4 by Defendants is improper under Fed. R. Evid. 201.

5 **I. Judicial Notice Is Appropriate Only for Specific, Undisputed Facts – Not**
 6 **the Entire Contents of Any and Every “Government Document.”**

7 As an initial matter, Defendants’ motion is based on an incorrect premise. Rule 201
 8 does not allow judicial notice of *documents*; it allows judicial notice of “a *fact* that is not
 9 subject to reasonable dispute” if that fact “can be accurately and readily determined from
 10 sources whose accuracy cannot reasonably be questioned” (emphasis added). The
 11 distinction is illustrated in *Lee v. City of L.A.*, 250 F.3d 668, 689-90 (9th Cir. 2001), where
 12 the Ninth Circuit explained that the trial court could properly take notice of the “*fact* of the
 13 extradition hearing” and the “*fact* that a Waiver of Extradition was signed,” but could not
 14 take judicial notice of “*disputed* facts stated in [these] public records.” *Id.* (emphasis in
 15 original). “On a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of
 16 another court’s opinion, it may do so ‘not for the truth of the facts recited therein, but for
 17 the existence of the opinion, which is not subject to reasonable dispute over its
 18 authenticity.’” *Id.* at 690 (quotation omitted). “[A] court cannot take judicial notice of
 19 disputed facts contained in such public records.” *Khoja v. Orexigen Therapeutics, Inc.*, 899
 20 F.3d 988, 999 (9th Cir. 2018).

21 Under Rule 201, Defendants may ask the Court to take judicial notice of the
 22 *existence* of the government documents, and they may identify *undisputed* facts within
 23 those documents as subjects of judicial notice. But that is not what Defendants’ Motion
 24 seeks. Rather, Defendants seek to dump “government documents” before the Court en
 25 masse and use these documents willy-nilly to “prove” disputed facts. Rule 201 does not
 26 permit such a tactic. *Lee*, 250 F.3d at 690; *Khoja*, 899 F.3d at 999; *Quinones v. Cty. of*

1 *Orange*, No. 20-56177, 2021 U.S. App. LEXIS 36293, at *4 (9th Cir. Dec. 9, 2021). “But
 2 accuracy is only part of the inquiry under Rule 201(b). A court must also consider — and
 3 identify — which fact or facts it is noticing from such a transcript. Just because the
 4 document itself is susceptible to judicial notice does not mean that every assertion of fact
 5 within that document is judicially noticeable for its truth.” *Khoja*, 899 F.3d at 999. *See also*
 6 *Hamm v. Equifax Info. Servs. LLC*, No. CV-17-03821-PHX-JJT, 2018 U.S. Dist. LEXIS
 7 123505, at *4 (D. Ariz. July 24, 2018) (“The court may take judicial notice of facts ‘not
 8 subject to reasonable dispute’”) (quoting Rule 201(b)); *Enos v. Arizona*, No. CV-16-00384-
 9 PHX-JJT, 2017 U.S. Dist. LEXIS 19268, at *9 (D. Ariz. Feb. 10, 2017) (same).

10 **II. Most of Defendants’ Request for Judicial Notice Is Improper.**

11 Further contrary to Defendants’ suggestion, it is not true that judicial notice may be
 12 taken of any and every “government document.” If that were true, government entities
 13 engaged in litigation could inject any material they wanted into the proceeding, irrespective
 14 of its provenance, simply by self-publishing it as a “government document.” Indeed, that
 15 is precisely what Defendants seek to do in this case, with respect to three of their proposed
 16 judicial notice documents. *See* Mot. for Jud. Not. Exs. 6, 7, and 13 (ECF nos. 29-7, 29-8,
 17 29-14). These three documents are nothing more than statements of the County’s litigation
 18 positions on disputed issues related to the claims in Plaintiffs’ Amended Complaint. They
 19 are not “sources whose accuracy cannot reasonably be questioned,” nor are they “not
 20 subject to reasonable dispute” within the meaning of Rule 201. Judicial notice may not be
 21 taken of these documents at all. A plaintiff may challenge the government’s self-serving
 22 declarations about the quality of its own work.

23 Accordingly, Defendants’ request for judicial notice can only be granted in small
 24 part. The Court may take notice that Defendants’ Exhibits 1, 10, 16, and 17 – official
 25 Maricopa County documents published for purposes other than declaring the County’s
 26 views on issues related to this litigation – were published and that the statements in them

1 were communicated to the public on the indicated dates, but the Court may not rely on
2 these documents to establish the truth of any fact disputed by Plaintiffs, such as the
3 reliability of Defendants' electronic election equipment or the feasibility of a hand-count
4 of ballots in the November 2022 election.

5 The Court may take notice that Defendants' Exhibits 2, 3, and 4 – federal EAC
6 documents – exist and were published by the EAC concerning the certification of
7 Dominion voting equipment, but again it may not rely on these documents to establish the
8 truth of any fact disputed by Plaintiffs. *Cf. Enos*, No. CV-16-00384-PHX-JJT, 2017 U.S.
9 Dist. LEXIS 19268, at *10 (holding that the Court must “disregard[]” evidence outside the
10 Complaint, such as “portions of the Federal Communications Commission’s website”).

11 The Court may take notice that Defendants' Exhibits 5, 9, and 11 – state documents
12 published by one of the defendants in this action – exist and were published to the public,
13 but again it may not rely on these documents to establish the truth of any fact disputed by
14 Plaintiffs.

15 The Court may take notice that Defendants' Exhibit 15 – a Maricopa County
16 document – exists as an official record of the county, but it may not rely on this document
17 to establish the truth of any fact disputed by Plaintiffs.

18 Defendants' Exhibit 8 is not a government document, but appears to be a report
19 created by a private company at the request of Maricopa County concerning issues placed
20 in dispute by Plaintiffs' Amended Complaint. It is not appropriate for judicial notice at all.

21 Defendants' Exhibit 12 appears to be a special master's report concerning litigation
22 between the Arizona State Senate and Maricopa County. If that is what it is, it may be
23 entitled to the same judicial notice as the court filings in *Lee*. “On a Rule 12(b)(6) motion
24 to dismiss, when a court takes judicial notice of another court’s opinion, it may do so ‘not
25 for the truth of the facts recited therein, but for the existence of the opinion, which is not
26 subject to reasonable dispute over its authenticity.’” *Lee*, 250 F.3d at 690.

1 Defendants' Exhibit 14 – an excerpt of the Arizona session laws in 1966 – is proper
2 for judicial notice that state law in 1966 was as stated.

3 The cases relied upon by Defendants are not on point. In *Tampa Elec. Co. v.*
4 *Nashville Coal Co.*, 365 U.S. 320, 332 (1961), a summary judgment case, the Supreme
5 Court took notice of the “approximate total bituminous coal (and lignite) product in the
6 year 1954 from the districts in which these 700 producers are located” – a concrete fact
7 apparently not in dispute between those parties. In *DeHoog v. Anheuser-Busch InBev*
8 *SA/NV*, 899 F.3d 758, 763 n.5 (9th Cir. 2018), the court took notice of unspecified
9 “undisputed matters of public record” found in various kinds of documents. In *Daniels-*
10 *Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010), the court took notice of
11 information “made publicly available by government entities (the school districts),” where
12 “neither party dispute[d] the authenticity of the web sites or the accuracy of the information
13 displayed therein.” In none of these cases did the courts take notice of disputed facts as the
14 basis for ruling against a party on the merits related to those facts. Rather, the courts
15 stressed that the noticed facts were not in dispute. In cases where a district court took
16 judicial notice concerning disputed facts, such as *Lee* and *Khoja*, the Ninth Circuit
17 reversed. In *Quinones*, where the district court took judicial notice of the fact of a guilty
18 plea and the defendant’s related statements, but declined to take notice of the underlying
19 fact of her mental state because that was a disputed fact, the Ninth Circuit approved. No.
20 20-56177, 2021 U.S. App. LEXIS 36293, at *4.

21 **III. Conclusion**

22 As explained in further detail in Plaintiffs’ opposition to the Maricopa Defendants’
23 Motion to Dismiss, issues related to the reliability of Defendants’ electronic election
24 equipment and to the audit of the 2020 Maricopa County election results are vigorously
25 contested. Fed. R. Evid. 201 does not permit Defendants to smuggle factual determinations
26 of disputed issues before the Court – at the pleadings state, no less – behind a fig leaf of

1 “judicial notice.” The Court should deny Defendants’ motion in large part, as described
2 above.

3
4 DATED: June 21, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2022, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

/s/ Andrew D. Parker